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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 699

BEATRICE L. GOLDSTONE AND EUGENE L. BONDY, EXECUTORS OF THE ESTATE OF MORRIS L. GOLDSTONE, DECEASED, PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (R. 14) is reported in 52 F. Supp. 704. The opinion of the Circuit Court of Appeals (R. 24) is reported in 144 F. 2d 373.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on August 28, 1944 (R. 28). The petition for a writ of certiorari was filed on November 24, 1944, and was granted on February 12,

1945 (R. 29).[1] The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the proceeds of certain contracts payable to his wife upon decedent's death are includible in his gross estate under Section 302 (c) of the Revenue Act of 1926, as amended.

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved are set forth in the Appendix, *infra*, pp. 20–24.

STATEMENT

The pertinent facts found by the District Court (R. 14–15, 19) and stipulated by the parties (R. 7–12) may be summarized as follows:

On June 29, 1933, the decedent purchased two contracts from the Equitable Life Assurance Society of the United States for the aggregate amount of $26,500 (R. 8–9). One contract, for which a single premium of $14,357.08 was paid, insured decedent's life for $18,928, payable upon death to his wife, or if she predeceased him, to their daughters. If all the beneficiaries predeceased decedent, the proceeds of the contract were

[1] The opinion of the Circuit Court of Appeals was filed on August 11, 1944 (R. 24). Hence the same question of whether the petition for certiorari was filed in time arises in this case as in *Commissioner* v. *Estate of Edward T. Bedford*, No. 710, this Term, where the Government contends that the petition was filed in time under similar circumstances.

to be paid to his executors or administrators. (R. 9, 15.)

A physical examination was not required of the decedent in connection with this contract. Instead, he was required to purchase the second contract which was designated an annuity contract. (R. 9.) A single premium of $12,142.92 was paid. This contract provided for semi-annual payments of $386.51 to be made to the decedent during his lifetime and for payment of $6,071.46 to his wife upon his death, or if she predeceased him, to the daughters, and if they were dead, to his estate. (R. 9, 15.)

Each contract provided that, during her lifetime, the wife should have the right to assign it, to borrow money on it, to receive dividends, to change the beneficiaries, and to surrender the contract and obtain its cash surrender value. If the wife should die before the decedent, however, these powers were to pass to him. (R. 9, 15.)

The decedent was sixty-three years of age when the contracts were purchased (R. 15). He died on February 23, 1938, survived by his wife and daughters (R. 8). His wife had not surrendered, assigned or alienated either contract prior to his death (R. 9).

Upon the death of the husband, the Equitable Life Assurance Society paid the widow $6,071.46 under the annuity contract, $18,928 under the life contract, and $182.24 as accumulated dividends, a total of $25,181.70 (R. 11, 25).

The Commissioner of Internal Revenue determined that the proceeds of the two contracts were includible in decedent's estate for estate tax purposes. A deficiency of $5,376.11 was assessed and paid. Upon rejection of a claim for refund, suit was brought in the District Court; its decision sustaining the action of the Commissioner (R. 19) was affirmed by the Circuit Court of Appeals for the Second Circuit (R. 28).

SUMMARY OF ARGUMENT

I

The decedent retained not only an annuity but also a contingent reversionary interest in the proceeds of the contracts. If he had survived his wife he could have exercised the attributes of ownership under the contracts, and if he had survived his wife and daughters the proceeds would have been payable to his estate when he died. While the wife was given the right during her lifetime to exercise incidents of ownership under the contracts and could have surrendered them for their cash value, she never did so; nor has it been shown that the parties ever contemplated that she would. Under the circumstances these powers of the wife, if significant at all, merely indicate the remoteness of the interest retained by the decedent.

Whatever doubts may previously have existed, *Fidelity-Philadelphia Trust Co.* v. *Rothensies,* No. 263, this Term, and *Commissioner* v. *Field,* No.

578, this Term, both decided February 5, 1945, establish that the retention of a reversionary interest, however remote, is sufficient to make applicable the provisions of Section 302 (c) of the Revenue Act of 1926, dealing with transfers intended to take effect in possession or enjoyment at or after the settlor's death. The decedent in effect retained the economic benefits from the property in the form of an annuity which was paid to him until his death, and not until then did the proceeds become payable to the widow. Not until death did the widow have the right actually to possess and enjoy the entire fund which became payable at death. Hence, the full proceeds are includible in the decedent's gross estate.

II

Since these contracts were taken out in 1933, the specific amendments to Section 302 (c) are also applicable. These amendments provide for inclusion in the gross estate of property donatively transferred where the decedent has retained for his life, or for any period which does not in fact end before his death, the possession or enjoyment of, or the right to the income from, such property. Since the decedent actually received an annual return upon his investment in the contracts for a period which did not in fact end before his death, the statute is applicable here. It is immaterial, in our view, that the wife, by exercising her powers, might have sur-

rendered the contracts prior to the decedent's death and thus have affected his interests thereunder.

ARGUMENT

I

THE PROCEEDS OF THE CONTRACTS ARE INCLUDIBLE IN THE GROSS ESTATE UNDER SECTION 302 (C) BECAUSE THERE WAS A POSSIBILITY OF REVERSION

In the instant case the decedent retained not only an annuity but also a contingent reversionary interest in the proceeds of the contracts; if he had survived his wife he could have exercised the attributes of ownership in the contracts, and if he had survived both his wife and daughters the proceeds would have been payable to his estate when he died. The wife never exercised any of her powers under the contracts prior to the death of the decedent. In these circumstances, the present case would appear to be controlled by *Helvering* v. *Le Gierse*, 312 U. S. 531; *Helvering* v. *Hallock*, 309 U. S. 106; *Fidelity-Philadelphia Trust Co.* v. *Rothensies*, No. 263, this Term, decided February 5, 1945; and *Commissioner* v. *Field*, No. 578, this Term, decided the same day. Under the principles established in these decisions, the entire proceeds of the contracts are includible in the gross estate under Section 302 (c) of the Revenue Act of 1926 (Appendix, *infra*, p. 20) as a transfer intended to take effect in possession or enjoyment at or after the decedent's death.

In the *Le Gierse* case, the Court held that a life insurance policy and an annuity policy issued at the same time should be considered together to determine whether there was any real insurance risk; that so considered there was no such risk; and that the "insurance" proceeds should therefore be included in the gross estate of the decedent as a transfer intended to take effect in possession or enjoyment at or after death within the meaning of Section 302 (c).[2]

In the *Hallock* case, the decedent had created a trust to pay the income to his wife for life, and upon her death to deliver the principal to the grantor, if living. If he should not then be living the property was to go to their children. The grantor predeceased his wife. The Court sustained the Commissioner's determination that the value of the corpus, less only the value of the wife's outstanding life estate, was properly includible in the gross estate as a transfer intended to take effect at or after the grantor's death.

In *Fidelity-Philadelphia Trust Co.* v. *Rothensies*, the decedent had created a trust to pay the income to the settlor during her life and at her

[2] See also *Chase National Bank* v. *United States*, 278 U. S. 327, 337; *Commissioner* v. *Clise*, 122 F. 2d 998 (C. C. A. 9th), certiorari denied, 315 U. S. 821; *Mearkle's Estate* v. *Commissioner*, 129 F. 2d 386 (C. C. A. 3d); *Commissioner* v. *Wilder's Estate*, 118 F. 2d 281 (C. C. A. 5th), certiorari denied, 314 U. S. 634; I Paul, Federal Estate and Gift Taxation, secs. 10.08–10.09, pp. 498–504.

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death to her two daughters during their respective lives. At the death of each daughter the corpus supporting her share of the income was to be paid to her descendants. If both daughters died without leaving surviving descendants, the corpus was to be paid to such persons as the settlor might appoint by will. The Court, following the rule of *Klein* v. *United States*, 283 U. S. 231, and *Helvering* v. *Hallock, supra*, held the full value of the corpus includible in the grantor's gross estate under Section 302 (c). In so holding, the Court stated:

> It is fruitless to speculate on the probabilities of the property being distributed under the contingent power of appointment. Indeed, such speculation is irrelevant to the measurement of estate tax liability. The application of this tax does not depend upon "elusive and subtle casuistries." *Helvering* v. *Hallock, supra*, 118. No more should the measure of the tax depend upon conjectures as to the propinquity or certainty of the decedent's reversionary interests. It is enough if he retains some contingent interest in the property until his death or thereafter, delaying until then the ripening of full dominion over the property by the beneficiaries. The value of the property subject to the contingency, rather than the actuarial or theoretical value of the possibility of the occurrence of the contingency, is the measure of the tax. That value is demonstrated by the consequences

> that would flow in this instance from the decedent's survival of her daughters and any of the latter's surviving descendants.

In the *Field* case, the decedent created a trust during his lifetime, reserving the income for life and also the right to get back the corpus if he should survive his two nieces. He did not survive them. The Court held that the full value of the trust property was includible in his gross estate under Section 302 (c). The Court referred to its holding in the *Fidelity-Philadelphia Trust Co.* case, and made the following additional observation:

> The estate tax is not based on the value of the reversionary interest of the decedent at the time of his death but on the value at the time of his death of the property to which that reversionary interest relates. It makes no difference how vested may be the remainder interests in the corpus or how remote or uncertain may be the decedent's reversionary interest. If the corpus does not shed the possibility of reversion until at or after the decedent's death, the value of the entire corpus on the date of death is taxable.

These decisions would appear to leave little doubt as to the correctness of the decision below. The decedent here retained a string upon the contracts which might have resulted in the restoration of complete domination over them. While the wife was given the power during

her lifetime to exercise certain incidents of ownership, including the right to surrender the contracts, the decedent nevertheless retained an interest sufficient to hold in suspense until his death the ultimate possession or enjoyment of the proceeds of the contracts. It would seem that surrender by the wife during the decedent's lifetime would have been at variance with the essential purpose of the arrangement, which was in the nature of an investment to mature upon the decedent's death (compare *Helvering* v. *Le Gierse, supra*). Indeed, if she had so surrendered the contracts immediately prior to the decedent's death, she would have received some $5000 less than she actually received when her husband died. (See fifth page of insurance contract, Exhibit B to stipulation of facts.) And the cash surrender value of a policy is not, of course, the true measure of its worth. *Guggenheim* v. *Rasquin*, 312 U. S. 254. This Court there said (p. 257) that—

> the owner of a fully paid life insurance policy has more than the mere right to surrender it; he has the right to retain it for its investment virtues and to receive the face amount of the policy upon the insured's death.

In other words, the surrender of the contracts by the wife here would have been at a sacrifice which she was apparently not prepared to make. As the Circuit Court of Appeals below observed (R. 39), "If the [wife's] powers are significant

for any purpose, they merely add to the remoteness" of the decedent's reversionary interest. The death of the husband was the operative fact which terminated all of his rights and enlarged those of his wife. None of the proceeds which the wife received came to her as the result of exercise of her powers under the contracts. The decisive consideration is that only at the moment of his death did the husband's reversionary interest come to an end. The transfer of the proceeds of the contracts thus took effect finally and definitely at the decedent's death, and hence falls within the established construction of Section 302 (c).

However, as was indicated in our memorandum in response to the petition for certiorari, the decisions in the lower courts have not been consistent in cases where a beneficiary has been given power to defeat the grantor's reversionary interest. In *Estate of Ballard* v. *Commissioner*, 47 B. T. A. 784, affirmed, 138 F. 2d 512 (C. C. A. 2d), it was held that in the circumstances the decedent's string on the trust property was a practical nullity and there was no sufficient basis for taxation under Section 302 (c). The Commissioner acquiesced in the *Ballard* decision (1944–15 Int. Rev. Bull. 1). We submit, however, that such acquiescence was improvident. The Tax Court has followed the *Ballard* decision in other similar cases (*Henry* v. *Commissioner*, decided January 16, 1943 (1943 P-H T. C. Memorandum Decisions, par. 43,023);

Goldsmith v. *Commissioner*, decided May 29, 1944 (1944 P-H T. C. Memorandum Decisions, par. 44,181)), and it was also followed by the Circuit Court of Appeals for the Third Circuit in *Lloyd's Estate* v. *Commissioner*, 141 F. 2d 758, where the grantor's son was given a power to defeat the reversionary interest by exercising a power of appointment. On the other hand, the Court of Claims in *Bailey* v. *United States*, 31 F. Supp. 778, certiorari dismissed, 311 U. S. 721, reached a conclusion in accord with the decision of the court below. It may be noted here that the decision of the Circuit Court of Appeals for the Second Circuit in the present case is inconsistent with its earlier decision in the *Ballard* case. This change in approach occurred even prior to the recent decisions of this Court dealing with the proper construction of Section 302 (c). Earlier decisions of the Second Circuit, such as *Commissioner* v. *Flanders*, 111 F. 2d 117; *Bankers Trust Co.* v. *Higgins*, 136 F. 2d 477; and *Field's Estate* v. *Commissioner*, 144 F. 2d 62 (reversed by this Court on February 5, 1945, No. 578, this Term), apparently went on the theory that only the interest which passed at death could be included in the gross estate as a transfer intended to take effect in possession or enjoyment at or after the grantor's death. But the decision below in this case proceeded from the premise—subsequently confirmed by this Court in the *Fidelity-Philadelphia* and *Field* cases—that the retention of a

possibility of reverter, however remote, is sufficient to justify taxability where the ultimate possession or enjoyment of the entire fund is actually kept in suspense until at or after the decedent's death.

It seems unnecessary to consider at length the nature and extent of the wife's powers under the contracts. Whatever may be their legal consequences (cf. *Helvering* v. *Safe Deposit & Trust Co.*, 316 U. S. 56, 58–59; *Helvering* v. *Stuart*, 317 U. S. 154, 165; *Estate of Rogers* v. *Commissioner*, 320 U. S. 410; *Richardson* v. *Commissioner*, 121 F. 2d 1 (C. C. A. 2d), certiorari denied, 314 U. S. 684; *Clark* v. *Commissioner*, 47 B. T. A. 865 (Acquiescence, 1942–2 Cum. Bull. 4)), it is clear that, under the *Field* case, it "makes no difference how vested may be the remainder interests in the corpus" if the grantor retained a reversionary interest, as he did here.

It may perhaps be argued that in the *Fidelity-Philadelphia* and *Field* cases the corpus could not have been distributed in the lifetime of the grantor, while in this case the wife, by taking appropriate action, could at her will have obtained at least part of what she ultimately received when her husband died and the contracts terminated. While we do not deny the possibility of such a distinction, we submit that it is without significance. Cf. *Tyler* v. *United States*, 281 U. S. 497; *United States* v. *Jacobs*, 306 U. S. 363. The controlling factor in all cases of this character is

the retention by the decedent of a string upon the corpus, and where that string exists at the moment of death, the statute is satisfied. The fact that the wife might have cut the string is immaterial if she did not in fact do so. See *Estate of Lloyd* v. *Commissioner*, 47 B. T. A. 349, 356.

In this connection we may refer to the course of decisions in the Tax Court on this question. It held originally that the retention of a remote reversionary interest is sufficient to impose taxability, even though there is also a possibility that the corpus may be distributed during the grantor's lifetime. See *Estate of Lloyd* v. *Commissioner*, 47 B. T. A. 349, 356. However, after its ruling in the *Lloyd* case was reversed by the Circuit Court of Appeals for the Third Circuit, 141 F. 2d 758, the Tax Court changed its views and held transfers non-taxable under Section 302 (c) in analogous situations. *Biddle* v. *Commissioner*, 3 T. C. 832, *Estate of Allen* v. *Commissioner*, 3 T. C. 844, both on appeal pending the outcome of the instant case. In a more recent case, *Estate of Walker* v. *Commissioner*, 4 T. C. 390, the Tax Court seems to have reverted to its original position.[3]

In summary, therefore, we submit that even though there is a possibility under the terms of

[3] The Tax Court there attempted to distinguish its earlier decisions in the *Biddle* and *Allen* cases upon the ground of remoteness but, as has been stated, such a distinction is no longer tenable under the principles established in the *Fidelity-Philadelphia* and *Field* cases.

a transfer for the property to be delivered completely and irrevocably to the ultimate taker during the lifetime of the grantor, nevertheless where there is also a possibility that it may revert to the grantor or his estate, and such possibility has not been extinguished prior to the moment of death, then the property is includible under Section 302 (c). And this is particularly so where, as here, the death of the decedent enlarged the rights of the beneficiary. Cf. *Tyler* v. *United States, supra; United States* v. *Jacobs, supra.*

II

THE PROCEEDS ARE ALSO TAXABLE UNDER SECTION 302 (C), AS AMENDED, BECAUSE THE DECEDENT ACTUALLY ENJOYED THE ANNUITY PAYMENTS UNTIL HIS DEATH

In point I we have relied upon the general provision of the statute as to transfers which take effect in possession or enjoyment at or after the grantor's death. This provision has appeared in the law ever since the first federal estate tax statute was enacted in 1916. It applies both to transfers made prior to and after the amendments of 1931 and 1932 (see Appendix, *infra,* p. 20). These amendments provide specifically, however, for the inclusion of interests of which the decedent has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period which does not in fact end before his death the possession or enjoyment of, or the right to the income from, the property. While these specific amendments are not retro-

actively applicable to transfers made prior to their passage (*Hassett* v. *Welch*, 303 U. S. 303), they are valid as to subsequent transfers (*Helvering* v. *Bullard*, 303 U. S. 297). Since the instant contracts were made in 1933, they are subject to the 1931 and 1932 amendments.

We submit that the amendments apply in this case to impose taxability because the decedent actually received an annual return of 2.9% on his investment in the form of an annuity so long as he lived. Here, as in the *Le Gierse* case, *supra*, the contracts were comparable in effect to a transfer in trust with a life interest reserved to the grantor. The rationale of the decision in the *Le Gierse* case is that such a transaction is in essence an investment by which the settlor secures a low rate of return in the nature of income for life, together with the undertaking of the insurance company to transfer the proceeds to the objects of his bounty at or after his death. See also *Commissioner* v. *Clise*, *supra*; *Mearkle's Estate* v. *Commissioner*, *supra*; *Commissioner* v. *Wilder's Estate*, *supra*; *Peek* v. *United States*, 38 F. Supp. 826 (E. D. Pa.); I Paul, Federal Estate and Gift Taxation, secs. 7.18, 10.03, pp. 352, 498–500. The decedent here actually received the economic benefits from the property during his lifetime. In the circumstances, we submit that

the transfer comes within the specific provisions of the 1931 and 1932 amendments.[4]

It is true, of course, that prior to her husband's death the wife could have brought to fruition the potential rights which she had under the contracts.[5] But she did not do so, and since the decedent actually received the income and enjoyed the economic benefits from the property for a period which did not in fact end before his death, we believe that the amendments apply. In this connection, the Court's attention is directed to the Committee Reports on the 1932 amendment (H. Rep. No. 708, 72d Cong., 1st Sess., pp. 46–47 (1939–1 Cum. Bull. (Part 2) 457, 490–491); S. Rep. No. 665, 72d Cong., 1st Sess., pp. 49–50

[4] The estate and income tax laws are not completely correlated or integrated (*Estate of Sanford* v. *Commissioner*, 308 U. S. 39, 47–48; *Higgins* v. *Commissioner*, 129 F. 2d 237, 240 (C. C. A. 1), certiorari denied, 317 U. S. 658), and whatever may be the income tax consequences flowing from a combination of contracts such as here involved (see *Commissioner* v. *Meyer*, 139 F. 2d 256 (C. C. A. 6); *Helvering* v. *Meredith*, 140 F. 2d 973 (C. C. A. 8)), it seems clear that under the *LeGierse* case the contracts must be considered together for estate tax purposes and when so considered the "annuity" received by the decedent during his lifetime was the substantial equivalent of the income for life within the meaning of the law. See *Estate of Reynolds* v. *Commissioner*, 45 B. T. A. 44; I Paul, Federal Estate and Gift Taxation, sec. 10.08, p. 499.

[5] It will be noted from page 1 of the annuity contract, of which a photostatic copy has been submitted with the record, that even if the wife had surrendered the contract, the husband would still have been entitled to receive a reduced annuity during his lifetime.

(1939–1 Cum. Bull. (Part 2) 496, 532), which state in part as follows:

> The insertion of the words "or for any period which does not in fact end before his death," which is to reach, for example, a transfer where decedent, 70 years old, reserves the income for an extended term of years and dies during the term, or where he is to have the income from and after the death of another person until his own death, and such other person predeceases him. This is a clarifying change and does not represent new matter.

This example indicates that Congress intended to look to the facts as they existed at the time of the decedent's death, regardless of what might have happened had a beneficiary or some other person previously exercised some right under the instrument of transfer. A similar rationale appears to underlie decisions of this Court in such cases as *Helvering* v. *Le Gierse, supra; United States* v. *Jacobs, supra; Tyler* v. *United States, supra.* In the *Jacobs* case, this Court said (p. 371):

> Until the death of her co-tenant, the wife could have severed the joint tenancy and thus have escaped the application of the estate tax of which she complains. Upon the death of her co-tenant she for the first time became possessed of the sole right to sell the entire property without risk of loss which might have resulted from partition

or separate sale of her interest while decedent lived. There was—at his death—a distinct shifting of economic interest,[6] a decided change for the survivor's benefit.

We submit, therefore, that the decision below may be sustained not only under the broad provision of the statute relating to transfers taking effect in possession or enjoyment at or after the grantor's death, but also under the specific amendments relating to the retention of income for life or for a period which does not in fact end before the grantor's death.

CONCLUSION

For the reasons stated, the judgment of the court below should be affirmed.

Respectfully submitted.

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MARCH 1945.

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[6] Citing *Chase National Bank* v. *United States*, 278 U. S. 327, 338; *Saltonstall* v. *Saltonstall*, 276 U. S. 260, 271.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 302 [as amended by Section 404 of the Revenue Act of 1934, c. 277, 48 Stat. 680]. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside the United States—

* * * * *

(c) [as amended by Joint Resolution of March 3, 1931, c. 454, 46 Stat. 1516, and by Section 803 (a) of the Revenue Act of 1932, c. 209, 47 Stat. 169]. To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, *or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom;* except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two

years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title.[1]

Treasury Regulations 80 (1937 ed.):

ART. 17 [as amended by T. D. 5008, 1940–2 Cum. Bull. 286, 287]. *Transfers conditioned upon survivorship.*—The statutory phrase, "a transfer * * * intended to take effect in possession or enjoyment at or after his death," includes a transfer by the decedent prior to his death (other than a bona fide sale for an adequate and full consideration in money or money's worth) whereby and to the extent that the beneficial title to the property transferred (if the transfer was in trust), or the legal title thereto (if the transfer was otherwise than in trust), is not to pass from the decedent to the donee unless the decedent dies before the donee or another person, or its passing is otherwise conditioned upon decedent's death; or, if title passed to the donee, it is to be defeated and the property is to revert to the decedent as his own should he survive the donee or another person, or the reverting of the property to the decedent is conditioned upon some other contingency terminable by his death. Since in such transfers the decedent's death is requisite to a termination of his interest in the property, it is unimportant whether his interest be denominated a reversion or a possibility of reverter, whether it arose by implication of law or by the

[1] The italicized portion represents the amendment made by the Joint Resolution of March 3, 1931, as amended by Section 803 of the Revenue Act of 1932.

express terms of the instrument of transfer, and whether the interest of the donee be contingent or vested subject to be divested, and the tax will apply, unless otherwise provided in the next succeeding paragraph, without regard to the time when the transfer was made, whether before or after the enactment of the Revenue Act of 1916. Thus, upon a transfer by a decedent of property in which an estate for life is given to one and an estate in remainder to another, but with a provision added that the estate in remainder shall revest in the decedent should he survive the owner of the life estate, there is to be included, in determining the value of the decedent's gross estate following his death, the value as of the date of his death of the estate in remainder, if the life estate is then outstanding. The value of the outstanding life estate is not to be included in determining the value of the gross estate, unless that estate had been transferred in contemplation of the decedent's death, or otherwise as to render it a part of the gross estate. If by reason of an election by the executor the valuation of the gross estate is governed by the provisions of article 11, adjustments in the values of such transferred estates may be required. (See article 15.)

Where the transfer was made during the period between November 11, 1935 (that being the date upon which the Supreme Court of the United States rendered its decisions in the cases of *Helvering* v. *St. Louis Union Trust Co.* (296 U. S. 39 [Ct. D. 1047, C. B. XIV–2, 339 (1935)]) and *Becker* v. *St. Louis Union Trust Co.* (296 U. S. 48 [Ct. D. 1046, C. B. XIV–2, 337 (1935)]) and January 29, 1940 (that being

the date upon which such Court rendered its decisions in *Helvering* v. *Hallock* and companion cases (309 U. S., 106 [Ct. D. 1440, C. B. 1940–1, 223]), and the Commissioner, whose determination therein shall be conclusive, determines that such transfer is classifiable with the transfers involved in such two cases decided on November 11, 1935, rather than with the transfer involved in the case of *Klein* v. *United States* (283 U. S., 231 [Ct. D. 333, C. B. X–1, 462 (1931)]), previously decided by such Court, then the property so transferred shall not be included in the decedent's gross estate under the provisions of this article, if the following condition is also met: Such transfer shall have been finally treated for all gift tax purposes, both as to the calendar year of such transfer and subsequent calendar years, as a gift in an amount measured by the value of the property undiminished by reason of a provision in the instrument of transfer by which the property, in whole or in part, is to revert to the decedent should he survive the donee or another person, or the reverting thereof is conditioned upon some other contingency terminable by decedent's death.

ART. 18 [as amended by T. D. 4868, 1938–2 Cum. Bull. 355]. *Transfers with possession or enjoyment retained.*—Except in the case of a bona fide sale for an adequate and full consideration in money or money's worth, the gross estate embraces (section 302 (c), as amended) all property transferred by the decedent, whether in trust or otherwise, if he retained or reserved the use, possession, right to the income, or other enjoyment of the transferred property, and if the transfer was made—

(1) At any time after 10.30 p. m., eastern standard time, March 3, 1931, and such retention or reservation is for his life, or for such a period as to evidence his intention that it should extend at least for the duration of his life and his death occurs before the expiration of such period; or

(2) At any time after 5 p. m., eastern standard time, June 6, 1932, and such retention or reservation is for any period mentioned in (1) or for any period not ascertainable without reference to his death.

A reservation for a "period not ascertainable without reference to his death" may be illustrated by a reservation of the right to receive, in quarterly payments, the income of the transferred property where none of the income between the last quarterly payment and decedent's death was to be received by him or his estate; or by a reservation of a life estate following a precedent estate for life or a term of years.

The use, possession, right to the income, or other enjoyment of the property, will be considered as having been retained by or reserved to the decedent to the extent that during any such period it is to be applied towards the discharge of a legal obligation of the decedent, or otherwise for his pecuniary benefit.

If such retention or reservation is of a part only of the use, possession, income, or other enjoyment of the property, then only a corresponding proportion of the value of the property should be included in determining the value of the gross estate.

(See article 15.)

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SUPREME COURT OF THE UNITED STATES.

No. 699.—October Term, 1944.

Beatrice L. Goldstone and Eugene L. Bondy, Executors of the Estate of Morris L. Goldstone, Deceased, Petitioners, *vs.* The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[June 11, 1945.]

Mr. Justice Murphy delivered the opinion of the Court.

The question here is whether the proceeds of certain contracts payable upon the death of the decedent to his wife are includible in his gross estate for estate tax purposes under Section 302(c) of the Revenue Act of 1926, as amended, Internal Revenue Code § 811(c).[1]

On June 29, 1933, the Equitable Life Assurance Society of the United States issued two contracts for which the decedent paid sums aggregating $26,500:

(1) The first contract, for which the decedent paid a single premium of $14,357.08, insured the decedent's life for $18,928, payable upon death to his wife or, if she predeceased him, to their daughters. If all the beneficiaries predeceased the decedent, the proceeds of the contract were to be paid to his executors or administrators. In lieu of a physical examination in connection with the issuance of this contract, decedent was required to purchase a second or an annuity contract.

(2) Under the annuity contract, the decedent paid a single premium of $12,142.92. The contract provided for semi-annual payments of $386.51 to be made to the decedent during his lifetime and for payment of $6,071.46 to his wife upon his death or,

[1] "The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death . . ."

if she predeceased him, to their daughters or, if they were dead, to his estate.

By the terms of each contract the wife had the unrestricted right to assign it, to borrow money on it, to receive dividends, to change the beneficiaries and to surrender the contract and obtain the surrender value thereof. The contracts designated her as the "Owner" or "Purchaser," the decedent being called the "Insured" or "Annuitant." In the event that the wife should predecease the decedent, the contracts provided that all of the enumerated powers were to vest in the decedent to the extent that such powers had not otherwise been exercised by the wife.

The decedent was 63 years old when the contracts were issued. He died nearly five years later, on February 23, 1938, survived by his wife and daughters. His wife had not surrendered, assigned or alienated either contract prior to his death. The Equitable Life Assurance Society thereupon paid the widow $6,071.46 under the annuity contract, $18,928 under the life contract and $182.24 as accumulated dividends, making a total of $25,181.70.

On these facts the Commissioner of Internal Revenue determined that the proceeds of the two contracts were includible in decedent's estate for estate tax purposes. The petitioners, as executors of the estate, were assessed a deficiency of $5,376.11. After paying that amount they filed a claim for refund. The claim was rejected. They then brought this suit for refund. The District Court sustained the action of the Commissioner and dismissed the complaint. 52 F. Supp. 704. The Second Circuit Court of Appeals affirmed this judgment. 144 F. 2d 373. An apparent conflict of authority among lower courts on the question presented led us to grant certiorari.[2]

Helvering v. *Le Gierse*, 312 U. S. 531, makes it plain that these two contracts, which must be considered together, contain none of the true elements of insurance risk. Section 302(g) of the Act, relating to amounts receivable "as insurance under policies taken out by the decedent upon his own life," is therefore inapplicable. The sole question there is [illegible]

[2] The judgment below is stated by the United States to be inconsistent with the result reached in Lloyd's Estate *v.* Commissioner, 141 F. 2d 758 (C. C. A. 3) and to be in harmony with Bailey *v.* United States, 31 F. Supp. 778 (Ct. Cls.). The United States also claims that the result below is inconsistent with the same court's prior affirmance of Estate of Ballard *v.* Commissioner, 47 B. T. A. 784, affirmed, 138 F. 2d 512 (C. C. A. 2). In view of the manner of our disposition of the instant case, however, we have no occasion to determine whether these asserted conflicts exist or whether the decision here necessarily controls the factual situations presented in these other cases.

are includible in the decedent's gross estate under Section 302(c) as the subject of a transfer intended to take effect in possession or enjoyment at or after the decedent's death. That question we answer in the affirmative.

Section 302(c), as demonstrated by *Helvering* v. *Hallock*, 309 U. S. 106, reaches all *inter vivos* transfers which may be resorted to, as a substitute for a will, in making dispositions of property operative at death. It thus sweeps into the gross estate all property the ultimate possession or enjoyment of which is held in suspense until the moment of the decedent's death or thereafter. *Fidelity-Philadelphia Trust Co.* v. *Rothensies*, 324 U. S. 108, 111. In so doing, Section 302(c) pierces all the verbiage of "unwitty diversities of the law of property." *Helvering* v. *Hallock, supra,* 118. Testamentary dispositions of an *inter vivos* nature cannot escape the force of this section by hiding behind legal niceties contained in devices and forms created by conveyancers.

In this instance the decedent carefully procured the issuance of two contracts in his wife's name without possessing for a measureable period most of the usual attributes of ownership over the contracts. But this procedure does not conceal the fact that decedent used these contracts as a means of effecting a transfer of approximately $25,000 of his estate to the natural objects of his bounty. Nor does it negative the fact that this *inter vivos* transfer possessed all the indicia of a testamentary disposition. There was, in other words, a "transfer of property procured through expenditures by the decedent with the purpose, effected at his death, of having it pass to another." *Chase National Bank* v. *United States*, 278 U. S. 327, 337. Section 302(c) must therefore be brought to bear.

The decedent, in making disposition of $25,000 of his property through these two contracts, retained a valuable interest in that amount which was not extinguished until he died. He retained not only the right to semi-annual payments under the annuity contract but also a contingent reversionary interest in the entire proceeds of both contracts. Had he survived his wife he could have exercised the attributes of ownership over the contracts, changing the beneficiaries or surrendering the contracts as he saw fit. If he had survived both his wife and his daughters the proceeds of the two contracts would automatically have been payable to his estate when he died. Thus the ultimate disposition of the

proceeds of the contracts was suspended until the moment of decedent's death. Only then did the respective interests of the wife and daughters become fixed; only then were their interests freed from the contingency of the decedent's survival. His death was the decisive fact that terminated all of his potential rights and insured the complete ripening of the wife's interests. The transfer of the proceeds of the contracts having been effectuated finally and definitely at the decedent's death, as in the *Hallock* case, Section 302(c) requires that those proceeds be included within the decedent's gross estate.

This conclusion is unaltered by the fact that the wife had the unrestricted power during the decedent's lifetime to exercise many important incidents of ownership over the contracts, including the power to terminate the decedent's reversionary interest in the proceeds. Whatever the likelihood of the exercise of this power, it is a fact that the wife did not change the beneficiaries or surrender the contracts so as to destroy decedent's reversionary interest. The string that the decedent retained over the proceeds of the contracts until the moment of his death was no less real or significant because of the wife's unused power to sever it at any time.

The essential element in this case, therefore, is the decedent's possession of a reversionary interest at the time of his death, delaying until then the determination of the ultimate possession or enjoyment of the property. The existence of such an interest constitutes an important incident of ownership sufficient by itself to support the imposition of the estate tax. *Helvering* v. *Hallock*, *supra*. The indefeasibility of that interest prior to death or the decedent's possession of other powers of ownership is unnecessary and indecisive of estate tax liability.

The disappearance of a decedent's reversionary interest, together with the resulting estate tax liability, prior to death through events beyond the decedent's control is a possibility in many situations such as the one in issue.[3] Likewise a reversionary in-

[3] Thus, in Fidelity-Philadelphia Trust Co. v. Rothensies, 324 U. S. 108, the decedent's contingent power of appointment was exercisable only if her two daughters died before her and left no surviving descendants. If the daughters died first but left surviving descendants, it would be certain before the decedent's death that her power of appointment would be nugatory. But such a contingency did not happen. At the time when the decedent died there was still the possibility that her power of appointment might be effective. ~~Hence the estate tax liability properly attached to the decedent's possession of that power at the moment of her death.~~ The fact that the power of appointment might have been destroyed prior to the decedent's death did not prevent the imposition of the estate tax. The decedent's death was still the decisive factor which enlarged and matured the interests of the daughters.

terest may become vested prior to a decedent's death because of the occurrence of other events beyond the realm of the decedent's volition and unconnected in any way with his death. But the imposition and computation of the estate tax are based upon the interests in actual existence at the time of the decedent's death. It follows that only those events that actually occurred prior to that moment can be considered in determining the existence and value of the taxable interests. Events that might have but failed to take place so as to erase a decedent's reversionary interest must be ignored; such unrealized possibilities, if significant at all, only add to the remoteness of the reversionary interest.

In our view of the case we need not consider the alternative argument urged by the United States to the effect that the specific amendments to Section 302(c) are also applicable since the decedent actually received an annual return from the contracts for a period which did not in fact end before his death. Nor do we reach any questions of valuation of the decedent's reversionary interest such as those which were decided in *Fidelity-Philadelphia Trust Co.* v. *Rothensies, supra,* and *Commissioner* v. *Estate of Field,* 324 U. S. 113.

Affirmed.

Mr. Justice Roberts.

I think the judgment should be reversed.

The court's decision repudiates *Helvering* v. *Hallock,* 309 U. S. 106, and other cases which have applied its reasoning. We have recently been told that the question whether, within the intent of the Revenue Acts, a transfer is "intended to take effect in possession or enjoyment at or after" the grantor's death is to be decided not by the terminology of conveyancing or the ancient real property law respecting vested and contingent estates, possibilities of reverter, and the like. We have been warned that the taxpayer and his estate must have regard to substance rather than to form, in answering the question whether the transfer becomes complete only at the transferor's death. I have assumed that the tax gatherer could not ignore the same test. Here I think the Commissioner is permitted to do just that. In order to reach substance in disregard of form, this court only recently has treated two independent contracts, one for insurance and the

other for an annuity, as constituting but a single transaction and amounting to a gift in favor of the beneficiary of the insurance policy. *Helvering* v. *Le Gierse*, 312 U. S. 531.

The transaction under review in the present case is a common one. Where an applicant for insurance is beyond the age at which a company will underwrite the risk, life insurance may be obtained by purchasing an annuity, which diminishes or eliminates risk of serious loss to the company by the early death of the insured. Here the decedent, a man of about sixty-three, in good health, and with apparently no contemplation of early death, consummated such an arrangement with an insurer. I think it demonstrable that the transaction as respects the beneficiary, his wife, was no different in substance or effect than an outright gift of money or property to her.

The decedent paid some $14,000 as a single premium for a policy by which the insurer agreed to pay some $18,000 to the beneficiaries named, that is, to his wife, if living, if she were dead, to his two daughters. The policy was issued to the wife and designated her as the owner of it. She had the following powers: To change the beneficiary without the husband's consent, to surrender the contract, assign or pledge it without his consent or that of any subsequent owner, change the form or plan of insurance (without reference to the insured, any beneficiary or subsequent owner), to surrender the contract and receive a specified cash value, to borrow on the policy at her sole election, to receive the dividends in cash or accumulate them to purchase additional insurance, in either case for her own use. If she exercised none of these rights the decedent would have become, at her death, if he were then living, the owner of the policy in her place and stead.

It is evident that if the policy be treated as an item of property, she had sole, full and untrammelled dominion over it and its proceeds. She was in truth, and not by any fiction, absolute owner of the property. I cannot distinguish this case from one in which a husband, not in contemplation of death, conveys money or property, real or personal, in fee simple to his wife or to any other relative. For, in such a case, all, or a portion of the property, may, upon the death of the donee, descend to the donor under the intestate laws, and both parties to the transaction know this to be the fact. Notwithstanding then that, under the law,

the wife may, until her death, spend, convey, mortgage or dispose of the property, I suppose it will be held that, inasmuch as all or some of it will descend to him if she omits so to do, he will be held, within the meaning of the statute, to have made a conveyance to take effect at his death because the only way he can avoid inheriting it from the donee is to die. Apparently courts are only to look to the realities of the situation, the essential nature of the ownership of the donee, where that spells taxability, but are to ignore the true character of the donee's untrammelled power over the subject matter of the gift where so to do spells taxability.

For the annuity purchased by the decedent he gave his check for the sum of $12,000. The contract describes his wife as the purchaser. Except for an annuity of a few hundred dollars per annum, payable to the decedent and subject to reduction under the terms of the contract, the wife's rights were again absolute. Upon the death of the decedent she was to receive a death benefit of some $6,000, but she might obtain this benefit at any time during his life, without his consent, and without other condition, upon mere surrender of the contract. Such surrender she might make without anyone's consent. She might, without decedent's consent, change to another form of plan or contract, or change the beneficiary, or assign the contract, might receive the dividends or allow them to accumulate, borrow money on the contract, and elect a mode of settlement thereunder. Her assignment of the contract might, if she so elected, exclude all rights of any beneficiary or annuitant under it. Here again, a small annuity, payable to the decedent only so long as his wife permitted, was the sole element of interest remaining in the decedent. The property was subject to the wife's dominion and hers alone.

To say that the decedent here retained an interest which passed at his death is to fly in the face of the facts. It is to say that, although we know the donee was as free to deal with the property as if she were described, in accordance with the niceties of conveyancing, or the ancient law of estates, as the owner in fee simple, yet this reality is to be ignored for the purpose of finding that the decedent gave her something less than absolute and full ownership of the property by enabling her to do exactly as she pleased with it; that the so-called "string" which he retained upon the property need not have the quality of a tie that binds.

Mr. Justice DOUGLAS joins in this opinion.